United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1598

B/S

ORIGINAL

To Be Argued By
THOMAS E. PATERSON

United States Court of Appeals

FOR THE SECOND CIRCUIT

RENEE KALSCHEUR, a minor by her parents and natural guardians, NORBERT KALSCHEUR and ISABEL KALSCHEUR and NORBERT KALSCHEUR and ISABEL KALSCHEUR in their own right,

Plaintiffs-Appellees,

—against—

JACK ROUNICK and LOIS ROUNICK,

Defendants-Appellants,

and

215 EAST 68TH STREET, INC.,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT
215 EAST 68th STREET, INC.

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FOR THE SECOND CIRCUIT

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BRIEF OF DEFENDANT-APPELLANT 215 EAST 68th STREET, INC.

Introductory Statement

The defendant, 215 East 68th Street, Inc., is the owner of an apartment house in New York City. The defendants Lois Rounick and Jack Rounick, are tenants in the apartment house.

The above entitled action was brought in the United States District Court, for the Southern District of New

York, to recover damages for personal injuries sustained by the plaintiff, Renee Kalscheur, while a guest at the apartment of the defendants, Lois Rounick and Jack Rounick, on the 10th day of July, 1968.

Federal jurisdiction is based on diversity of citizenship.

The case was tried before the Hon. William C. Connor and a jury. At the close of the entire case the court submitted the issues to the jury and the jury returned a verdict in favor of the plaintiff and against the defendants in the total sum of $31,800. The jury apportioned the verdict so as to make the defendants, Jack and Lois Rounick, 50% liable and the defendant, 215 East 68th Street, Inc., 50% liable.

The defendants appeal from the judgment thereafter entered in favor of the plaintiff and against the defendants in the office of the Clerk of the United States District Court, for the Southern District of New York.

Questions Presented

The appeal of 215 East 68th Street, Inc. presents the following questions:

1. Did the court err in failing to dismiss the complaint?

The court answered this question in the negative by submitting the case to the jury.

2. Did the plaintiff present any evidence which raised questions of fact concerning the negligence of the defendant, 215 East 68th Street, Inc.?

The court answered this question in the affirmative.

Statement of Facts

Plaintiff, Renee Kalscheur, was an eighteen year old college student on July 10, 1968. She resided in Wisconsin with her parents but during the previous scholastic year she attended Harcum Junior College in Philadelphia and on at least several occasions during the school year she visited her sister, Lois Rounick and her brother-in-law, Jack Rounick, at their apartment in New York City (68a, 69a, 79a, 80a, 81a, 92a). This apartment was located on the 20th floor of a modern apartment house at 215 East 68th Street in Manhattan and was owned by the defendant, 215 East 68th Street, Inc. The apartment consisted of five rooms with an outdoor terrace leading off the dining room of the apartment (36a, 37a, 164a).

One was able to enter onto the terrace by sliding a glass panel door open. Besides the glass panel door there was a fixed glass panel adjacent to the door. Both the sliding glass door and the fixed glass panel were mounted in metal frames and when the door was open it slid back across the glass panel. The door and the panel were of clear glass, each measuring approximately 4 and ¾ feet wide and some 9 and ½ feet high (37a, 42a, 110a, 111a, Plaintiff's Exhibits 1 through 4 in Evidence).

In the summer of 1968, Renee Kalscheur, decided to come to New York City and attempt a modeling career (83a). Her sister and brother-in-law (the Rounicks) offered to let her stay at their apartment which offer she accepted. Her sister, Lois Rounick, who had, sometime in June, repaired to East Hampton on Long Island for the summer, supplied her with a key to the apartment and informed the building management of the arrangement (51a, 69a, 82a). Renee, upon accepting the offer arrived at the apartment some 10 days or two weeks prior to

July 10, 1968, and lived at the apartment without incident until the evening of that day (82a). On July 10, 1968, she returned to the apartment in the evening with two young male friends, Michael Wright and Michael Kelly (84a). Around 10:00 or 10:30 o'clock in the evening as the three were gathered in the living room of the apartment they heard sirens wailing in the street. On impulse they decided to go out on the terrace to see what they could see going on in the city streets below. Renee preceded the two young men. She drew the drapes covering the glass door and glass panel, opened the glass terrace door all the way and stepped onto the terrace and Michael Kelly and Michael Wright went out side by side behind her. The door made no noise as it was opened and she did not close the door behind her. She remained at the railing of the terrace some five or ten minutes. She was then told the phone was ringing in the dining room and as she was expecting a call from her brother-in-law she turned, took 4 or 5 steps across the terrace and as she stepped up over the saddle of the door with her right foot she struck the glass door with her knee, the glass door having been closed by one of her guests unbeknownst to her. When her knee contacted the door the glass shattered and she passed through the door and was still standing when she entered the dining room. The area was constructed in such a way that one had to step up 6 or 8 inches to get from the terrace to the dining room (57a-58a, 85a, 86a, Plaintiff's Exhibits 1 through 4 in Evidence).

The door itself and the glass panel had been installed by the owner of the apartment house in 1962 when the building was built and had remained in the same condition from the time of its installation until the accident occurred some six years later (164a).

The defendant, Lois Rounick, testified that after an incident involving her husband in September, 1967, she had phoned the building management and spoke to a man called "Archie" requesting he place decals or some other kind of marking on the door. She was assured by Archie that he would do as she requested. However, nothing was done and she called in May, 1968, a second time and again spoke to Archie. This employee she claimed again assured her the building management would take care of marking the door and that she was to do nothing about it. However the building management placed no decals or stripping on the door and there were no decals or stripping on the door when the accident happened (42a, 46a-47a, 49a, 50a).

The building superintendent testified that he had been the building superintendent since 1962 and that there was no employee by the name of Archie in the building at the time the defendant, Lois Rounick, allegedly made her calls. The only Archie the building manager knew and that was revealed by the records of the building, was an Archie Tessyman who was hired by the building in May, 1969, a year after the last phone call allegedly made by Mrs. Rounick. This employee was a handyman who worked for the building from May, 1969, until his demise in 1972, thus strongly contradicting the testimony of Mrs. Rounick that she in fact had made a phone call to the building at any time before the accident complaining of the condition of the windows (171a, 172a, 173a).

There is no testimony in the record that the defendant and actual lessee of the premises, Jack Rounick, ever made any complaint with reference to the door and panel prior to the accident occurring July 10, 1968.

The plaintiff was hazy and contradictory as to the number of times she had actually used the terrace prior to

the accident but there is no question that on the evening the incident occurred she was able to operate the sliding door and knew well enough the configuration of the door, the glass panel, the drapes covering the glass door and the fixed panel and the terrace itself (85a, 86a, 90a, 91a, 92a, 93a).

In its charge the court instructed the jury as follows:

> "Plaintiffs claim that the failure of defendants either to mark the glass panel so that was clearly visible and could not be mistaken for unobstructed space, nor to warn Renee about the danger involved, constituted negligence which caused her injury. Defendants deny that they were negligent and contend that the injury was caused by Renee's own negligence." (197a)

The court at no time charged the jury that there was any statutory violation or that the door was improperly constructed.

POINT ONE

The complaint should have been dismissed as to the defendant, 215 East 68th Street, Inc., as there was no evidence that this defendant breached any duty owing to the plaintiff.

The court below correctly refused to charge the jury that there was any statutory violation by the landlord in not placing decals or stripping on the glass door. The court merely charged the jury that it could find the landlord negligent if they found it negligently failed to place decals or other markings on the door.

This was clearly error and the court should have dismissed the complaint as to the landlord, for in the absence

of any responsibility placed on the landlord by statute the tenant takes the premises as he finds them and the duty of the landlord is governed only by the terms of its lease with the tenant. 34 N.Y. Jurisprudence, Landlord & Tenant Sec. 448.

There were no negligent acts here by the landlord and there was no failure by the landlord to perform some legal duty imposed upon it by the common law of New York, or by the terms of the lease.

In the landlord-tenant relationship the landlord is under no legal duty to maintain or alter the premises.

In the instant case there was no statutory duty to place decals or other similar markings on the glass door and nothing in the lease between the defendants that required the owner to make alterations in the leased premises. Nor is liability against the landlord created, if in fact it is credible that Mrs. Rounick phoned the management of the building requesting that decals be placed on the door and she was assured it would be done but was not, because a mere failure to perform a voluntary promise does not charge a party with liability. In short, the landlord had no duty to place decals on the glass door and its voluntary promise to do so does not cast it in damages. Liability arises out of a voluntary promise only where the landlord or owner acts on the promise and negligently makes the alterations or repairs to plaintiff's damage. Nor is there here any evidence in the case that the decals were, after the accident, placed on the door by the landlord as evidence of some control. 34 N.Y. Jurisprudence, Landlord and Tenant Section 448. *Scheirmeister* v. *Kahn,* 22 A.D. 2d 829; *Scudero* v. *Campbell,* 288 N.Y. 328.

In the case of *Madey* v. *Gray Drug Stores,* 40 A.D. 2d 270, a finding of negligence was made against the occupier or lessee of the premises but the cross-complaint of Gray

Drug Stores against the landlord was dismissed by the trial court. The Appellate Division in upholding this dismissal of the cross-complaint stated at page 273:

> "Finally, there was no evidence of any defect in the construction of the entrance door or the premises sufficient to bring Gray Drugs within the protection of the Forest City Warranty. Rather it seems reasonable to conclude the jury found that Gray Drugs could easily have placed markings, lettering, decals, push rail, door knobs, door handles, masking tape, posters, signs or otherwise marked the glass door to warn plaintiff of its existence and that the injuries and damages suffered by the plaintiff came as a result of its failure to do so."

So here in the instant case a similar situation exists. There is no proof of any defect in the construction of the glass panel door and no obligation under the lease to alter the door.

Finally it must be stated that there was no failure on the part of the landlord to warn the Rounicks or the plaintiff of a hidden defect or dangerous condition which was not readily observable by the Rounicks. The condition of the glass door was clearly observable by the Rounicks and the plaintiff. Jack Rounick had been living in the apartment for some 5 years prior to the accident, his wife two, and the plaintiff had visited the premises on at least several occasions and knew how the door was constructed and how it operated.

Under the circumstances there was neither the commission of a lawful act by the landlord in a negligent fashion nor an omission by the landlord to perform a legal duty which could be said to be the proximate cause of the accident and the complaint should be dismissed.

POINT TWO

The complaint should be dismissed since there was no evidence of a defect in the construction of the glass door and no affirmative act on the part of the defendant, 215 East 68th Street, Inc., on which plaintiff relied to her damage.

In reviewing the decisions in the court of New York State it becomes readily apparent that a recovery has been permitted only where a defendant has obstructed a hitherto unobstructed entranceway creating an illusion of space. In the New York cases where recovery has been allowed the accident to the plaintiff was preceded by an affirmative act on the part of the defendant to plaintiff's damage. *Madey* v. *Gray Drug Stores, Inc.*, 40 A.D. 2d 270; *Shannon* v. *Broadway & 41st Street Corp.*, 272 App. Div. 1029, affirmed 298 N.Y. 589; *Grabel* v. *Handro Co.*, 161 N.Y.S. 2d 998.

In the *Madey* case, supra, the 18-year-old plaintiff was injured when he walked or jogged at about 9:00 p.m. through a plate glass door of the defendant Gray Drugs Stores. He had entered the store, made a purchase and went outside to make a phone call from a public phone booth. After making the call he was informed by the operator that there were additional charges and he returned to the drug store to get more change. The door had now been closed but he was able to see people inside and the store was lighted. He attempted to walk or run through what once had been an open door of clear glass and crashed through it. The plaintiff in the *Madey* case had been at the drug store on other occasions but on on each of these occasions had found the door open.

In affirming the judgment for the plaintiff in the *Madey* case the court stated at page 272:

> "In Shannon as in the instant case there was reliance on the passageway being unobstructed and appriate to use as a means of ingress and egress. *Such reliance was caused by defendant's actions and induced plaintiff to continue to use the indicated passageway.* The proof here further shows Gray Drugs, blocked the means of ingress with a transparent, unmarked glass panel." (Emphasis ours)

And at page 273 of the same case the court states:

> "In brief, we conclude that where there is no induced reliance or illusion of space, recovery should be denied. (Cooper v. Sharf, supra). *But where the facts reveal that after it has caused the plaintiff to rely upon the existence of an open passageway, the defendant closes that passageway without any warning and by the same act creates an illusion that the passageway is still open and unobstructed, then, we conclude that a question has been raised which requires a jury determination.*" (Emphasis ours)

In the case of *Shannon* v. *Broadway & 41st Street Corp.*, supra, the Appellate Division affirmed a judgment for the plaintiff with two dissents grounded on the plaintiff's contributory negligence as a matter of law, indicates that there must be some affirmative act on the part of the defendant after having induced a reliance by the defendant that there was an open space. The court stated in the *Shannon* case as follows:

> "The jury was free to find that the passageway, partitioned by the glass, had been used freely, prior to the accident as an entrance and an exit during the summer, and that the glass was not made visible

by posters or any other device to one using the passageway."

See also the case of *Grabel* v. *Handro,* 161 N.Y.S. 2d 998 in which there was also an affirmative act on the part of the defendant in removing masking tape from a glass door and thus changing the condition upon which the plaintiff had come to rely.

The key to liability then would appear to be an affirmative act on the part of the defendant which changed a condition upon which the plaintiff had come to rely, in short, had blocked an hitherto unobstructed space with clear glass. Where those facts do not exist or where there is no evidence to support such facts there should be a dismissal. *Cooper* v. *Sharf*, 11 A.D. 2d 101; *Luciano* v. *Mapart, Inc.*, 14 A.D. 2d 843, leave to appeal denied 11 N.Y. 2d 642; *Gardino* v. *H. S. Barney Co., Inc.*, 17 A.D. 2d 895; *Vella* v. *Seacoast Towers "A" Inc.*, 32 A.D. 2d 813.

In *Cooper* v. *Sharf* the court denied recovery to the plaintiff who claimed she walked through a glass panel.

Although there are few facts recited in the opinions of the *Luciano* and *Gardino* cases, supra, it is apparent that the courts in the absence of proof of faulty maintenance or construction have held that no cause of action will lie against a defendant.

In the case of *Vella,* supra, although the facts in the opinion are sparse a resort to the record on appeal indicates that the plaintiff was visiting the apartment of his sister which was located in an apartment house near a beach. During the course of the day the plaintiff passed through the front entrance leading into the lobby of the building. Later in the day he attempted an exit and claimed that because of the lighting conditions at that time of day the door was invisible and it being now shut he ran into it.

The trial court in the *Vella* case dismissed the complaint and the Appellate Division affirmed stating that "While under some circumstances a glass door exit may be constructed or maintained in a manner so as to constitute negligence (case cited) in the instant case there was a complete absence of proof of negligence on the part of defendant. *There was no evidence offered to show faulty construction or improper maintenance.*"

The weight of authority would seem to be then that the courts will permit recovery in cases such as the instant case only where (1) the defendant has induced the plaintiff to rely on an open space and then by affirmative act of defendant blocks the space with clear glass or (2) where the defendant places clear glass in an area where one would not ordinarily expect it to be found and which creates an illusion of space. *Jaillet* v. *Gottfried Home Bakeries,* 354 Mass. 267.

Neither one of these exceptions appear in the instant case. Renee Kalscheur knew that there was a sliding door leading onto the terrace. She herself opened it on the evening of the accident. It opened silently. She preceeded her two guests onto the terrace placing her back to the door. She continued to stand at the railing of the terrace for five to ten minutes with her back to the door. One of her guests had reentered the apartment and as she walked through the door, Mike Kelly, her guest said, "Oh, My God, are you all right, I'm sorry" (87a).

Obviously the defendant, 215 East 68th Street, Inc., did not close the door after Renee had entered on the terrace. It did not cause the plaintiff to believe that the opening between the dining room and the terrace would remain open and Renee knew that the door could be slid shut by either of her guests. The accident was not caused by faulty construction or maintenance but by the headlong rush of the plaintiff from the terrace to the dining room. *Weigant* v. *United Traction Co.,* 221 N.Y. 39.

CONCLUSION

The plaintiff's complaint should be dismissed as the plaintiff has shown no duty was breached by the defendant, 215 East 68th Street, Inc., and has shown no negligent condition which 215 East 68th Street, Inc. had a duty to maintain.

Respectfully submitted,

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Attorneys for Appellant, 215 East 68th Street, Inc.

Thomas E. Paterson
Of Counsel

376—Affidavit of Service by Mail

United States Court of Appeals
For the Second Circuit

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

Renee Kalscheur, a minor by her parents and natural guardian, Norbert Kalscheur and Isabel Kalscheur and Norbert Kalscheur and Isabel Kalscheur in their own right,

Plaintiffs-Appellees
against
Jack Rounick and Lois Rounick
Defendants-Appellants
and

215 East 68th. Street Inc.,
Defendant-Appellant

AFFIDAVIT OF SERVICE BY MAIL

State of New York, County of New York **ss.:**

Raymond J. Braddick, agent for Thomas E. Patterson Esq. Defendant-Appellant being duly sworn deposes and says that he is the attorney for the above named herein. That he is over 21 years **of age, is not a party to the action and resides at** 8 Mill Lane Levittown, New York

That on the 29th. **day of** July , 1974 , **he served the within** Brief

upon Kremer, Krimsky & Luterman P.C.
attorneys for the above named Plaintiffs-Appellees

by depositing 3 true copies **of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at 90 Church Street, New York, New York**

directed to the said attorney for the Plaintiffs-Appelles
at No. One Ea t Penn Square Philadelphia Pennsylvania

N. Y., that being the address within the state designated by them for that purpose, or the place where they then kept an office, between which places there then was and now is a regular communication by mail.

Sworn to before me, this 29th
day of July **19** 74

Raymond J. Braddick

Roland W. Johnson
ROLAND W. JOHNSON
Notary Public, State of New York
No. 4609705
Qualified in Delaware County
Commission Expires March 30, 1975